

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Acceleration of Broadband Deployment)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	

COMMENTS OF THE CITY OF LENEXA, KANSAS

The City of Lenexa, Kansas (hereinafter “City” or “Lenexa”) files these comments in response to the Notice of Inquiry (“NOI”), released April 7, 2011, in the above-entitled proceeding. Lenexa is a community of 48,000 located in Johnson County, Kansas in the greater Kansas City metropolitan area. Through these comments, Lenexa seeks to provide the Commission with basic information regarding its local right of way and facility management practices and charges.¹

The City of Lenexa has endeavored to be the Communications City of Choice in the Kansas City metropolitan area for many years.² To achieve this goal, the City was one of the first communities in the area to adopt a comprehensive right of way management ordinance that balanced the City’s responsibility as stewards of the public right of way against the desire to promote the efficient use of the right of way by telecommunications providers and other utilities.

¹ We use the term “charges” to include both any cost recovery that is part of right-of-way and facility management (such as permitting fees), as well as other compensation we may receive from communications companies for use of the rights-of-way and other facilities consistent with state and local law.

² See Lenexa Vision 2020, p.92, <http://lenexa.com/main/pdfs/Vision2020.pdf>, July 1997.

Lenexa has developed considerable expertise applying its policies to protect and further public safety, economic development, and other community interests, while encouraging deployment of innovative technologies throughout the community. Management and regulation of this community asset is a purely local matter that should remain in the hands of local elected officials. The City urges the Commission not to interfere with these local policies. By adopting rules in this area, the Commission could disrupt this process at substantial cost to local taxpayers and to the local economy. We believe that a basic respect for federalism, a fair reading of the Constitution and the Communications Act, and an honest assessment of the Commission's limited expertise on local land use matters all point to the same conclusion: this is no place for federal regulation.³

The City has successfully managed its property to encourage deployment of several broadband networks to date. As a result, broadband service is available to 100% of households and businesses in Lenexa and the vast majority of those have a choice among providers. There is no evidence that the City's policies or charges with respect to placement of facilities in the right of way or on City property have discouraged broadband deployment. Rather, our community *welcomes* broadband deployment, and our policies allow us to work with any company willing to provide service. The City recognizes that speed, ease and agility are key goals of broadband providers in their quest to deploy their facilities throughout our community. Clear, fair and readily accessible local right of way regulations do not hinder deployment – rather they benefit all parties by minimizing chaos among users of this important, but finite, public resource.

³ See City of Resolution No. 2011-66: A RESOLUTION OF THE GOVERNING BODY OF THE CITY OF LENEXA, KANSAS IN OPPOSITION TO THE FEDERAL COMMUNICATIONS COMMISSION NOTICE OF INQUIRY RELATING TO ACCELERATION OF BROADBAND DEPLOYMENT, adopted July 5, 2011, attached hereto as Exhibit A and incorporated herein by reference.

Lenexa has a proven record of working to help providers meet their deployment goals. In 2001, the City was the first community in the region to welcome a new provider in the Kansas City market: Everest Connections. In only 16 months, the City was overbuilt and Everest had deployed their bundled cable television, phone and internet services to our community. City staff worked cooperatively with Everest on a wide variety of issues, including streamlined application submission and review processes. Over 100 Everest crews deployed throughout Lenexa during construction and weekly meetings with key City officials were held to troubleshoot problems as they arose. An overbuild of this magnitude involves extreme disruption to the public right of way, as well as other public and private property and requires constant interaction with citizens to minimize public dissatisfaction. Without adherence to the regulations of the City regarding issues such as permitted work hours, construction practices, required restoration and traffic control issues, the result could have been very different. Fortunately, the process in Lenexa worked and with a great deal of cooperation between the City and the provider, the project was completed four months ahead of Everest's aggressive schedule.

In the Everest example and in many others, the City's policies have helped to avoid problems and delays in broadband deployment by ensuring that the deployment goes smoothly for both the providers that follow the rules and for the larger community. On the other hand, we also know that many entities seeking access to our rights of way and facilities would prefer to live without rules and regulations, to the great detriment of other users, abutting landowners, commuters, and the general taxpayer.

I. Application Procedures, Forms, Substantive Requirements, and Charges

The Commission asks whether all necessary application procedures, forms, substantive requirements, and all charges are readily available. See NOI ¶14. The City of Lenexa strives to

provide all such information on its website so that it is accessible at all times. This includes, specifically:

- The City Code: <http://www.lenexa.com/LenexaCode/CityCodes.html>
- Right of Way Permit Information/Application Form:
<http://www.lenexa.com/commdev/traffic.html>
- Planning and Zoning Applications and Forms:
<http://www.lenexa.com/commdev/applications.html>
- Fees: <http://www.lenexa.com/finance/fees.html>

II. Sources of Delays

The Commission asks what factors are chiefly responsible when or if applications are not processed in a timely fashion. The Commission also asks about errors or omissions in applications. *Id.* In Lenexa, most applications are processed very quickly. Right-of-way permit applications, in particular, are typically processed within 24 hours. However, in some cases, review of the proposed installation can take longer due to the size and complexity of the project or because an application is incomplete or contains erroneous information. This is often something as simple as listing an incorrect address or failing to call Kansas OneCall or provide confirmation that OneCall was contacted in accordance with Kansas law.⁴

The City's Right of Way Manager performs application review. An important component of the review process is a careful review of the proposed installation route to ensure that existing utilities are safe from damage caused by the installation. The Right of Way Manager also considers how congested the right of way is in the proposed installation area and

⁴ See K.S.A. 66-1801 *et seq.*, the Kansas Underground Utility Damage Prevention Act.

may request additional investigation using SUE QL-A be done to insure that the applicant is fully apprised of the congestion and can safely install their facilities without damage to existing facilities.

Other causes for delay may include: (1) determining whether the provider or its subcontractor are the proper applicant; (2) sending and receiving applications from neighboring communities that were erroneously submitted to the wrong jurisdiction; and (3) coordinating with neighboring jurisdictions when an installation will cross jurisdictional boundaries.

III. Improvements

The Commission asks whether there are particular practices that can improve processing. See NOI ¶¶14, 29. As noted above, Lenexa has made its Code and virtually all applications available on-line and has found that these simple steps have improved the process significantly and, perhaps more importantly, allowed the process to move more quickly. The City's Right of Way staff is readily available to answer questions that arise, as they arise. In addition, staff is available 24/7/365 in the event of an emergency to assist with traffic control, locating services, or providing information to the community of utility outages during emergency repairs.

Lenexa sees its relationship with right of way users as a partnership, as do many of our neighboring communities. In fact, municipal staff members from across Johnson County meet monthly with utility operators to discuss on-going and future projects. The Utility Liaison Coordinating Committee ("ULCC"), as it is called, works to provide coordination among projects, users and jurisdictions and updated information for all parties to aid in scheduling future projects. The City also participates in the Common Ground Alliance Regional Partners Committee which meets monthly, focusing on damage prevention to existing utilities. This group includes many of the ULCC participants, but also includes contract locators, construction

contractors, design engineering firms, and insurance representatives. The City's participation in these groups is important not only because of what we learn from the meetings, but also because it helps Lenexa staff develop relationships with the right of way users, which helps ensure effective communication and mutual respect on Lenexa right of way projects.

The Commission also inquired into innovative deployment practices. For many years, the City worked to convince utility providers to cooperate and consider the use of joint or common trenches and duct banks. Nearly twelve years ago, the City sought input from right of way users regarding the construction of duct banks. When the right of way users initially refused to participate in the duct bank design, the City – undeterred - took the initiative to construct duct banks on its own as major arterial parkways were rebuilt with the goal of selling space to right of way users in the future. To date, Lenexa has constructed approximately 23 miles of duct banks and right of way users are starting to purchase space in the existing constructed ducts. More importantly, these users now see the advantages of the duct banks and are now willing to participate in the design of new projects that will incorporate them. The latest project was designed with input from every utility operator and the end result is a duct bank system that is well designed and constructed to the exacting requirements of each user.⁵

In Lenexa, it is common today for right of way users to work with the City and other operators to construct and occupy a common trench and joint trench projects. The benefits of this type of cooperation include cost savings and better protection against third party “dig ins.”

IV. Permitting Charges

The Commission seeks data “on current permitting charges,” including all recurring and non-recurring charges, as well as any application, administrative, or processing fee. Specifically, the Commission asks commenters to identify:

⁵ Photographs of a City duct bank are attached hereto as Exhibits B, C & D and incorporated herein by reference.

- The type of facilities for which such charges are assessed;
- How such charges are structured (e.g., per foot or percent of revenue in the case of rights of way fees);
- Whether the community is subject to comprehensive state franchising or rights of way laws;
- Whether the charges are published in advance or individually negotiated, designed to approximate market rates or merely recover costs (direct and/or indirect), and accompanied by comprehensive terms and conditions; and
- The value of any in-kind contributions required for access or permit approval.

The Commission further asks whether such charges are related to impacts on the local community, such as pavement restoration costs for projects that involve trenching in roadways.

See NOI ¶17.

For right of way excavation permits, the City's fee is \$40.00 per address affected by construction. This fee was established to recoup the following direct City expenses:

- staff time associated with review of applications;
- inspections of permitted work;
- cost of utility locates charged to the City;
- equipment used by staff; and
- maintenance of equipment used by staff.

If a roadway needs to be excavated to access existing utilities or to place new utilities in the paved area, a restoration charge is assessed pursuant to Lenexa City Code Section 4-6-I-7-B:

For Facilities Work Involving Street Cuts or Street Excavations: Cost Per Square Yard for Street Overlays and Sealcoats x Depreciation Rate x Area of Influence = Street Cut or Excavation Fee

"*Cost Per Square Yard*" shall be determined by the City Engineer on an annual basis as of January 1, using average costs for materials required to overlay, sealcoat, or build a City street.

"*Depreciation Rates*" shall be determined by the City Engineer.

"*Area of Influence*" shall be the area of the street cut + 3 feet on each side thereof.

The components of this fee formula are adopted and published annually and displayed on the City's website. See http://www.lenexa.com/finance/pdfs/schedule_of_fees_2011.pdf.

Lenexa does not charge for the following:

- Core holes or small street cuts for the purpose of locating the horizontal and vertical location of existing utilities;
- Sidewalk removal for repair of existing utilities or the placement of new facilities;
- Permits issued for relocation of facilities to accommodate City projects;
- Permits issued for new home construction for utility connections; or
- Lane closures to accommodate repair of existing facilities or installation of new facilities.

Pursuant to Kansas law, the City enters into non-exclusive contract franchises with all utility providers, telecommunications providers, and cable television service providers. To ensure that providers are treated uniformly and in a nondiscriminatory manner, the franchise agreements are uniform for each type of provider and all franchises include a 5% of gross

receipts franchise fee.⁶ Video service providers (“VSP”) in Kansas may obtain state authorization to provide video service within provider-designated service areas. Once such authorization is approved, VSPs may provide service in any locality covered by its state authorization upon thirty days notice to the municipality and execution of a standardized video service provider agreement. VSPs pay a video service provider fee of 5% of gross receipts. The City does not collect a franchise fee on cable modem service.

V. Local Policy Objectives

The Commission asks what policy goals and other objectives underlie the local right of way practices and charges. The City of Lenexa views its primary role as trustee of the public rights of ways charged with ensuring that the overall public health, safety, welfare and convenience are preserved. The City’s policies concerning right of way management are competitively neutral and nondiscriminatory.⁷ The City recognizes that broadband deployment plays an increasingly prominent role in the quality of life for its residents and is essential for economic development. Further, the City embraces state of the art technologies which enhance Lenexa’s image and attract public and private investment.⁸ However, the public right of way is, at its core, a finite public resource and it is in the public interest and the interest of all users of the rights of way that order in the right of way is maintained.

VI. Possible Commission Actions

Finally, the Commission asks what actions the Commission might take in the area. See NOI ¶36. As noted above, the City of Lenexa urges the commission to refrain from regulating local right of way management and facility placement processes. These are highly fact specific

⁶ See K.S.A. 12-2001 *et seq.*; K.S.A. 12-2006 *et seq.*; and K.S.A. 17-1902.

⁷ See Lenexa City Code Section 4-6-I-1.

⁸ See Lenexa Vision 2030, <http://lenexa.com/main/pdfs/Vision2030.pdf>, p.39, October 2008.

matters which turn on local engineering practices, local environmental and historical conditions, local traffic and economic development patterns, and other significant community concerns and circumstances. These matters are most effectively managed by local staff with considerable expertise. Imposing a federal regulatory regime would create unnecessary costs for the Lenexa community and could undermine important local policies. Likewise, Commission regulation of charges for use of the rights of way could have significant impacts on the community and the important public services it provides. Although no Commission action is necessary, any such action should be limited to voluntary programs and educational activities and to implementing its own recommendations in the National Broadband Plan for working cooperatively with state and local governments.

CONCLUSION

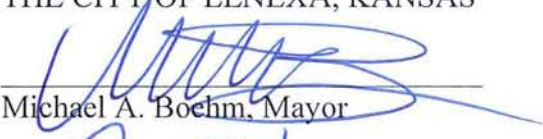
The City of Lenexa urges the Commission to conclude that right of way and facility management and charges are not impeding broadband deployment. In Lenexa, Kansas, our policies and procedures are designed to protect local interests, but also encourage broadband deployment. Lenexa, Kansas is a success story in this regard. There is absolutely no evidence that its local policies have impaired any company from providing broadband service here and there are many reasons to believe that unnecessary federal regulation would be counterproductive and disruptive in our community.

[Signature page follows]


Respectfully submitted,

THE CITY OF LENEXA, KANSAS

By:


Michael A. Boehm, Mayor

By:


Andy Huckaba, Councilmember and
Chairman of the National League of Cities
Information Technology & Communications
Committee

12350 W. 87th Street Parkway
Lenexa, Kansas 66215

cc: National League of Cities, Bonavita@nlc.org

RESOLUTION NO. 2011-66

**A RESOLUTION OF THE GOVERNING BODY OF THE CITY OF LENEXA,
KANSAS IN OPPOSITION TO THE FEDERAL COMMUNICATIONS
COMMISSION NOTICE OF INQUIRY RELATING TO ACCELERATION OF
BROADBAND DEPLOYMENT**

WHEREAS, the City of Lenexa supports the universal availability of affordable broadband service to all Americans and recognizes the increasing and vital role that broadband communications, both wireless and wireline, play in economic development as well as homeland and hometown security; and

WHEREAS, on April 7, 2011, the Federal Communications Commission ("FCC") issued a notice of inquiry ("NOI") entitled "Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facility Siting"; and

WHEREAS, the NOI appears to be based on the premise that local rights of way regulatory and compensation issues constitute "barriers to entry" for broadband service; and

WHEREAS, right of way regulation and/or compensation does not present a barrier to broadband deployment in Lenexa, as the vast majority of Lenexa citizens enjoy access to broadband, with competitive choice among providers; and

WHEREAS, the same is true in cities throughout the United States, as recent research conducted by the National Telecommunications and Information Agency demonstrates the highest levels of broadband deployment are found in high density areas, such as cities; and

WHEREAS, Congress underscored the right of local governments to manage their rights of way and obtain reasonable compensation for use thereof through inclusion of Section 253 in the Communications Act (see 47 USC 253(c)). Further, Section 332(c)(7) of the Communications Act makes clear that local governments also retain zoning authority over the siting of wireless devices and that the FCC has no jurisdiction to preempt such local regulations; and

WHEREAS, in accordance with this authority, the City of Lenexa has enacted regulations which protect the health and safety of its residents and the integrity of public infrastructure while allowing broadband deployment to occur in an orderly and timely fashion; and

WHEREAS, the FCC should not use the NOI to issue orders that would limit municipal authority through federal preemption. To do so would exceed the



FCC's authority and is in direct contravention to the provisions of the Communications Act.

NOW, THEREFORE, BE IT RESOLVED BY THE GOVERNING BODY OF THE CITY OF LENEXA, KANSAS:

SECTION ONE: a. The City supports the continued deployment of broadband services throughout the community, state and nation;

b. The City urges the FCC to respect the need for local control of public rights of way and local regulation of the providers who occupy public rights of way; and

c. The City strongly opposes the federal preemption of local right of way management or zoning authority and any action by the FCC which limits the ability of local governments to collect reasonable compensation for the use of public property in accordance with state law.

SECTION TWO: A copy of this resolution shall be included with the comments to be filed with the FCC on or before July 18, 2011 regarding the NOI.

PASSED by the City Council this 5th day of July, 2011.

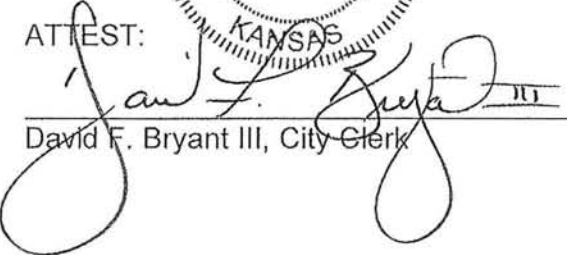
SIGNED by the Mayor this 5th day of July, 2011.

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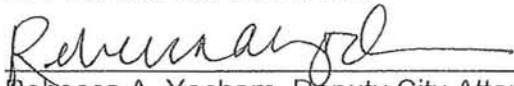



Michael A. Boehm, Mayor

ATTEST:


David F. Bryant III, City Clerk

APPROVED AS TO FORM:


Rebecca A. Yocham, Deputy City Attorney



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EXHIBIT

B



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